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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1925
No. 264

ST. LOUIS-SAN FRANCISCO RAILWAY CO.,
Petitioner,

vs.

ODELL MILLS, AS ADMINISTRATRIX OF THE ESTATE OF IRA S. MILLS, DECEASED,
Respondent.

ON WRIT OF CERTIORARI TO THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

The writ of certiorari in this case was granted to review a judgment of the United States Circuit Court of Appeals for the Fifth Circuit, which affirmed a judgment rendered by the District Court for the Northern District of Alabama in favor of the plaintiff, respondent here, in an action under the Federal Employers' Liability Act to recover for the death of respondent's intestate.

The opinion of the Circuit Court of Appeals is reported in 3 Fed. (2nd Series) 882.

The broad ground upon which the jurisdiction of this Court is invoked is that the respondent's intestate, Ira S. Mills, was not employed in interstate commerce

within the meaning of the Federal Employers' Liability Act, at the time of his death.

The precise questions raised in the District Court and in the Circuit Court of Appeals appear in the following

STATEMENT OF THE CASE

This action, in which judgment was rendered against petitioner for $13,750 in the District Court, was brought to recover damages of the defendant railway company, the petitioner here, for the death of Ira S. Mills who, during the shopmens' strike on the railroads in August, 1922, while returning from work after having terminated his hours of service for the day and while on a public street car in the city of Birmingham, Alabama, was shot to death by strikers.

Mills, the decedent, was employed by petitioner (hereinafter referred to as defendant) as a car repairer during the strike in the summer of 1922. On the night of August 3rd after he had completed his work in the defendant's yards at Birmingham, had gone off duty and was returning home on one of the street cars of the Birmingham Railway, Light & Power Company, he was shot to death by unidentified strikers who opened fire without warning from the rear platform of the street car upon Mills, and upon Weathers, a companion car repairer, and Cantrell, a deputy sheriff employed by the defendant who was guarding the two men from work to their homes.

The theory of liability which the trial court submitted to the jury and which the Circuit Court of Appeals sustained on the appeal of the defendant railway com-

pany from the judgment that ensued was: (1) Even though Mills had completed his entire work, had left the premises of the defendant and was on his way home in a public conveyance he was still "employed in interstate commerce" within the meaning of the Federal Act; and (2) while so employed, the defendant could, as the jury was allowed to find, have been guilt of a negligent failure to furnish greater protection to Mills in the form of a stronger guard which might, by a greater display of force have deterred the murderers from accomplishing or attempting to accomplish, the murder.

The idea that defendant may have rested under a duty to furnish a stronger guard for Mills and his companion Weathers was predicated upon testimony given by Weathers that threats had been made by strikers against him, Weathers, information as to these threats given by Weathers to Wilkins, the man in charge of the deputies guarding the yards, and some slender and indefinite testimony tending to show cowardice on the part of Cantrell, the guard, in the face of strikers on other occasions.

The trial court, however, expressly declined to submit to the jury any question as to whether on the occasion of the murder, Cantrell was guilty of negligence or cowardice proximately inducing the shooting.

That one of the last tasks performed by Mills before he left the yards was connected with interstate commerce is conceded, but it was and is the contention of petitioner that upon the cessation of that task, and an hour later, of Mills' duties for the night, all possible connection with interstate commerce came definitely to an end: that the relationship of master and servant between the defendant and Mills did not continue during the time

of the journey on the street car and that at the time of the murder there was no possible employment in interstate commerce, so as to furnish the basis for a cause of action under the Federal Act.

The theories of liability were elaborated by the trial court in the oral charge to which the defendant reserved numerous exceptions, and by the court's refusal of the defendant's requested instruction directing a verdict in its favor.

The evidence (Record pp. 32, 33) showed that the last work in interstate commerce done by Mills was the inspection of an interstate train about ten o'clock. Thereafter Mills and Weathers took their tools back to the yard office, turned in their report, washed up and at fifteen minutes past eleven left the yards with Cantrell, the guard. They walked some distance, took the street car, and shortly thereafter one of three strikers on the back platform of the street car attempted to force Weathers to leave the car as it stopped to take on a passenger. When Weathers resisted the strikers commenced shooting into the car and Mills was mortally wounded.

Upon the foregoing undisputed facts it was and is the contention of petitioner:

(1) That Mills was not, at the time of the shooting, employed in interestate commerce;

(2) That petitioner rested under no duty to provide Mills with a heavier guard than it did;

(3) That it is wholly a matter of speculation and conjecture whether the shooting would have been averted, even if a heavier guard had been furnished;

(4) That irrespective of any question of negligent failure of the petitioner in that particular, the immediate proximate cause of the death of Mills was the interven-

ing wrongful act of the strikers for which petitioner was in no way responsible.

The following portions of the oral charge of the District Judge, to which the defendant reserved appropriate exceptions, show the theory upon which the case was submitted to the jury: (Record pp. 56-60).

(a) "So the first question is to determine whether Mr. Mills was an employee of a kind that could have brought a suit, had he lived, under the Federal Employers' Liability Act. If he was, then, of course, his administratrix could bring a suit for his death.

(b) "Now, of course, there would have to be shown a duty on the part of the company to take care of him beyond his place of work and to his home in order that he remain an interstate employee when he was shot.

(c) "And you would have to find that in this case in order to put him in the status of one who had a right to sue under this act, and he would have had to remain an employee, not only on the company's premises, but at the time of the shooting, that is, on his way home, and, therefore, until he got home, in order that he be entitled, or that his administratrix be entitled to sue under this act.

(d) "That is to say, if there was a duty that attended while he was on his way home on the part of the company to protect him and to give him protection then a violation of that duty would be a violation of a duty to an interstate employee while he was on his way home from doing interestate work at the company's premises.

(e) "Now, it is for you to say whether he was an employee in the sense that he was engaged in interstate commerce, or employed in interstate

commerce at the time of his death, depending, as I say, on whether or not he did work before he left the yards inspecting interstate trains; second, whether he was protected by employment or custom that existed in this case that he was to be protected beyond the company's property and to his home.

(f) "If you find those two things, then you have a right to say that he was an interstate commerce employee at the time he was shot.

(g) "The next proposition is whether there was any negligence on the part of the company that he could complain of as an employee under the Federal Employers' Liability Act.

(h) "Therefore, your first inquiry on this would be whether there was any duty on the part of the railroad company to protect him against assault from strikers at the time he was hurt.

(i) "Of course, that rule could be modified by a contract made between him and the company that they would protect him or give him protection not only while he was on their premises, but while he was going to and fro between their premises and home.

(j) "So it is that if, by custom, they had been furnishing protection for such length of time as would induce employees to believe that employees would be protected and they would undertake to furnish protection, then it would be a question of fact for you to determine, not me, whether out of that custom a duty would or would not spring up to furnish protection, not only on the premises, but on the journey of the man to his home.

(k) "That is to say, if for some length of time they had been in the habit of furnishing guards to take the men to their homes, and the men had been working under that custom, undertak-

ing a surety, then it would be a question of fact whether a duty arose from those acts on the part of the company to continue to furnish guards on any particular trip.

(l) "You must find there was a duty in order to predicate negligence.

(m) "Now, the contention of the plaintiff is this: She says that there was an inefficient guard, in numbers, furnished the decedent, Mr. Mills, and that there was negligence, and that if there had been a sufficient guard, in numbers, furnished, the assault would have been prevented by the presence of more guards and the plaintiff's intestate would not have been killed.

(n) "Now, in this case it seems to me your attention should be converged on what Wilkins did, because, as I understand, the railway company itself had guards around and could not be charged with negligence in not furnishing sufficient guards at East Thomas.

(o) "The question would be, it seems to me, whether Wilkins under the circumstances sent enough guards with these two men, Weathers and Mills.

(p) "Now, the question is whether you believe that a reasonably prudent man would have anticipated danger, if you believe that those things were told to Wilkins, from the reports that were made to him, were of such a character that would have made a reasonably prudent man have reinforced the guard and send the guards with them.

(q) "On the other hand, if you believe the reports were made as stated by Mr. Weathers, and if you believe from all the circumstances and the situation of the strike, a reasonably prudent man would have reasonably anticipated that the danger was of so great an extent that he would have sent more guards than one

guard, then that failure to send more guards than one guard, you might say was—you might find negligence on the part of Wilkins. It is for you to say whether it was or not.

(r) "On the other hand, if you are reasonably satisfied that there was a departure from due care on the part of Wilkins, and that he was guilty of negligence in not sending more guards along with Weathers and with Mills, and you find that to be negligence on his part, * * *

(s) "Then you would next inquire whether it was a cause or proximate cause of the plaintiff's intestate's death.

(t) "If you are reasonably satisfied from the evidence that the assault would have been prevented had a greater guard been furnished, if you also find that a greater guard should have been furnished in the exercise of due care, then, then that would show that that was the causal relation in the failure to furnish it and the accident resulting in the death of the intestate."

The Circuit Court of Appeals in affirming the judgment by its opinion handed down on the 17th day of December, 1924, held:

"The employee's day's work being in both intrastate and interstate commerce, while, after finishing his day's work, he was making a trip which was a necessary incident of that work as a whole, he was employed in interstate commerce. *Erie R. R. Co. v. Winfield*, 224 U. S. 170. Though when the employee was shot he had left the employer's premises and was on a vehicle operated by a third party, it fairly may be said that he was still an employee if the trip he was making was in immediate connection with his employment, and during that trip the

employer owed him a duty, the performance of which was part of the consideration by which he was induced to enter upon and continue the employment. *Wilson v. Banner Lumber Co.*, 32 So. 460; *Doyle v. Fitchburg R. Co.*, 25 L. R. A. 157. The evidence as to the circumstances under which the employee entered upon and remained in the employer's service furnished support for an inference that the employer's undertaking to furnish the employee protection during the trip from his home to the place of work and from the place of work back to his home was part of the consideration moving to the employee for the service rendered. It might be inferred that such protection had to be furnished to obtain labor at the place needed, and that the relation of employer and employee still continued while the employee was on his way from his place of work to his home accompanied by a guard furnished by the employer pursuant to an implied obligation to protect the employee from perils to which he was exposed in consequence of his employment. There was evidence furnishing support for a finding that there was negligence in the matter of having the employee guarded while he was returning to his home."

As to the question of proximate cause the Court of Appeals said:

"Negligence properly may be regarded as the proximate consequence of an injury if it appears that the injury was the *natural* and *probable* consequence of the negligence, and that in the light of the attending circumstances it ought to have been foreseen by the wrongdoer. A careless person is liable for all the *natural* and *probable* consequences of his mis-

> conduct. If the misconduct is of a character which according to the usual experience of mankind is calculated to *invite* or *induce* the intervention of some subsequent cause, the intervening cause will not excuse him, and the subsequent mischief will be held to be the result of the original misconduct. *Milwaukee, etc., Railway Co. v. Stone*, 213 U. S. 1, 9; *Delaware & Hudson Co. v. Ketz*, 233 Fed. 31. If the employer negligently failed to perform a duty incurred by it to protect the deceased from assault or personal violence while on the trip from his place fo work to his home, and if in the circumstances of that misconduct a natural and probable consequence of it was a reasonably avoidable exposure of the deceased to personal violence during that trip, and in the light of those circumstances the employer ought to have foreseen that such misconduct on its part was calculated to invite or induce peril to the deceased which resulted in his injury and death, the fact that the source of that peril was an independent agency would not keep the deceased's death from properly being held to be the result of his employer's negligence." (Italics ours.)

Petitioner respectfully asserts that upon each of the two vital issues in the case the foregoing conclusions of the Circuit Court of Appeals are erroneous; that the judgment of the said Court of Appeals was in error and that said Court should have reversed the judgment and remanded the cause to the District Court.

The decision of the Court of Appeals was not unanimous. See dissenting opinion of Estes, District Judge, at page 885 of 3 Federal Reporter (2nd Series). The attention of the Court is called to the fact that the dis-

senting opinion does not appear in the record. The omission is explained by the fact that when the record on the petition for certiorari was completed by the Clerk of the Circuit Court of Appeals, the dissenting opinion had not been filed.

But the following analysis in the dissenting opinion of Judge Estes discloses the unsoundness of the majority opinion:

> "I do not concur in the view of the majority of the Court that the employee in this case was, at the time of his death, engaged in interstate commerce, I do not think, therefore, that the rights of the parties are to be determined by the provisions of the Federal Employers' Liability Act. (Comp St. 8657-8665.)
>
> "That act can, under the Constitution and by its own terms, apply only to cases where both the employer and the employee, at the time of the injury, were engaged in interstate commerce. Employers' Liability Cases, 207 U. S. 501, 28 S. Ct. 141, 52 L. Ed. 297; 8 Fed. Stat. Ann. 1208. Of course, in the great variety of circumstances and conditions that continually arise, its application sometimes becomes a difficult problem. But it is quite manifest that, in order to come within its provisions, the work being done both by the employer and the employed, when the injury occurs, must have such imminent or immediate connection with the interstate commerce work of the road as to be, in a very real sense, a part of such commerce. *Shanks v. Delaware Railroad*, 239 U. S. 556, 36 S. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; *Pedersen v. Delaware Railroad*, 229 U. S. 146, 33 S. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. The fact that the work was in the nature of preparation for work that has to do with interstate commerce, the general character or

scope of an employee's duties what he may have done before he was injured, or what he intended to do afterward, are relatively unimportant. The nature of the work being done at the immediate time of the injury—the task at hand—is the determining factor. *Chicago Railway v. Harrington*, 241 U. S. 177, 36 S. Ct. 517, 60 L. Ed. 941; *Minneapolis Railway v. Winters*, 242 U. S. 354, 37 S. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54; *Shanks v. Railroad, supra.*

"In every case where the application of the act has been considered by the Supreme Court, this test, in so far as I have been able to ascertain, has been applied. *Pederson v. Delaware Railroad*, supra; *North Carolina Railway v. Zachary*, 232 U. S. 260, 34 S. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; *Illinois Railway v. Behrens*, 233 U. S. 473, 34 S. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; *Delaware Railroad v. Yurkonis*, 238 U. S. 439, 35 S. Ct. 902, 59 L. Ed. 1397; *Shanks v. Delaware Railroad, supra; Minneapolis Railway v. Winters, supra; Erie Railroad v. Winnfield*, 244 U. S. 171, 37 S. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918E, 662; *Lehigh Railway v. Barlow*, 244 U. S. 183, 37 S. Ct. 515, 61 L. Ed. 1070.

"The evidence in this case shows without dispute that the day's work of the injured employee had been concluded. His tools had been put in place and his reports had been made. He had left the employer's premises, and was shot when en route home on a street car. As I view it, neither the employer nor the employee were engaged in interstate commerce at the time of the tragedy, or, indeed, in commerce at all.

"Every employee of a railroad must, in order to report for work, leave his home in the morning and return at the close of the day. Such a trip may be said to be "a necessary in-

cident of his work as a whole." If that were the decisive thing—that is, that the trip was necessary to his work as a whole—then any employee whose work on the railroad is of an interstate character may be said to be engaged or employed in interstate commerce when making such trips. The relation to interstate commerce in that instance would be the same as in this case.

"If there was a duty on the part of the employer to furnish protection to an employee at such time, it was a duty occasioned by a special obligation or contract to do so. It might be, as the trial court said in his charge, that " a violation of that duty would be a violation of the employer's duty to an interestate employee," but the point is that in order to make the statute applicable, the employee must, at the time of his injury, have been more than an interstate employee. He must, at such time, have been himself engaged in interstate commerce. This is true, even though it may be said that under the conditions "the deceased was an employee of the company, and the protection was a part of the consideration which induced him to enter upon and continue in the employment." That fact would not mean that he was engaged in interstate commerce at the time of his injury."

The opinion of the Circuit Court of Appeals announces:

(1) A radical extension of the scope of the Federal Employers Liability Act in two vital particulars since it holds: (a) That the relationship of employer and employee exisits even though the employee has terminated his work and is on his way home on a vehicle not under the control of the employer and while the em-

ployee though under the protection voluntarily afforded by the employer, is no longer in any sense under the employer's dominination or control; (b) That the voluntary act of the employer in affording an employee protection from violence immediately becomes transmuted into a legal duty resulting from the contract of employment which the employer must perform in such a way as to insure the safety of the employee.

(2) A novel and unsound extension of the theory of proximate cause in its relation to an independent, intervening criminal act that actually and directly resulted in the death of Mills in holding: (a) That the shooting of Mills on a public conveyance in the presence of the car crew and other passengers was a "natural and probable consequence" of the failure of the defendant to furnish a heavier guard, and one which the defendant could reasonably have anticipated; (b) That the supposed negligence of the defendant invited and induced the shooting.

The theory as to proximate cause announced by the Circuit Court of Appeals is an unsound and erroneous application of the language of the opinion of this court in the leading case of *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, which invoked a principle of the law of proximate cause wholly inapplicable to the case at bar.

ARGUMENT

I

Mills Not Employed in Interstate Commerce.

While it is true that one of the last duties performed by Mills before leaving the yards at East Thomas was

that of an interstate employee, it is submitted that there is no basis, either in law, or in fact, for holding that it was for the jury to decide that the interstate status of Mills remained with him until the time of his death. As a matter of fact he remained, according to the undisputed testimony, in the yards for some time after completing his last interstate service in connection with the train to Amory.

His duties to the company, and his hours of service under his employment terminated when he left the yards at East Thomas. Thereafter, the protection which the defendant sought to accord Mills, while of course given in part in its own interest, had no relation to any former interstate status of Mills.

It is true that a number of cases have held that an employee still retains that relationship to the employer, either while on the premises of the employer or riding to or from work free, on a conveyance furnished by the meployer, but in an elaborate analysis of that line of decisions, Labatt says (Vol. 4, p. 4674):

> "The decisions reviewed in the preceding sub-section are referable to the conception that the master retains the right to control the serright, although ordinarily dormant during the period of transportation, is susceptible of being at any moment called into active operation."

In the present record there is absolutely nothing to indicate that the work of Mills for the night, and any control of his future action by the defendant, had not definitely ended. Again, it is said by Labatt (Vol. 4, p. 4679), in referring to those cases holding that the serv-

ant could not recover because of the negligence of a fellow servant:

> "Both on principle and authority it is clear that the defense of common employment is not available to the master where the injured person was traveling entirely for his own purposes and the right of the master to exact the performance of services was not merely dormant but wholly suspended."

The test of whether there is an interstate relationship has been repeatedly stated by this court, and in no decision more clearly than in *Illinois Central R. Co. v. Behrens*, 233 U. S. 473, 58 L. Ed. 1051. There, it was contended for the plaintiff that although at the moment of the injury the plaintiff was engaged in an intrastate movement, he would immediately afterward have become engaged in interstate commerce. The court said:

> "That he was expected upon the completion of that task to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

And in *Erie R. Co. v. Welsh*, 242 U. S. 303, 61 L. Ed. 319, it was held that a yard conductor on an interstate railway injured while alighting from a slowly moving freight engine, for the purpose of reporting to the yardmaster's office for further orders, having executed all previous orders, was not an employee in interstate commerce, although the orders which he would have received had he not been injured would have required him

immediately to make up an interstate train. The court said:

> "It was in evidence also that the orders plaintiff would have received had he not been injured on his way to the yard office would have required him immediately to make up an interstate train. Upon the strength of this it is argued that his act at the moment of his injury partook of the nature of the work that, but for the accidental interruption, he would have been called upon to perform. In our opinion this view is untenable. By the terms of the Employers' Liability Act the proper test is the nature, of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act."

The following language from the opinion in *Minneapolis, etc., R. Co. v. Winters*, 242 U. S. 353, 61 L. Ed. 358, is in point, where the court, holding that the mere expectation that an engine when repaired would be employed in interstate commerce was not sufficient to create an instrumentality of commerce at the time of the injury, said:

> "It simply had finished some interstate work and had not yet begun upon any other. Its next work so far as appears might be interstate or confined to Iowa as it might happen. *At the moment it was not engaged in either.* Its character as an instrument of commerce depended upon its employment *at the time*, not upon remote probabilities or accidental later events." (Italics ours.)

And in *So. Ry. Co. v. Puckett,* 244 U. S. 571, 61 L. Ed. 1321, the court, in deciding the question whether at the time of the injury an employee was engaged in interstate commerce, said:

> "Of course we attribute no significance to the fact that the plaintiff had been inspecting interstate commerce before he was called aside by the occurrence of the collision."

And in *So. Ry. Co. v. Pitchford,* 253 Fed. 736, the Circuit Court of Appeals for the Fourth Circuit observed:

> "It is immaterial that the plaintiff's last previous work may have been cleaning an interstate car, or that his next work would certainly have been icing an interstate car from the ice box."

The present case is obviously distinguishable from the decision of the *Supreme Court in Erie R. Co. v. Winfield,* 244 U. S. 170, 61 L. Ed. 1057, where an employee injured while in the act of leaving the yards after having been there employed in interstate commerce, was held to be entitled to sue under the act. For there, Winfield was still on the employer's premises, and under all the decisions entitled to the protection of the relationship while leaving the yards because the company owed him a duty to enable him to get beyond its premises without being exposed to the negligence of other employees. And the case at bar is obviously distinguishable from the situation presented in *North Carolina R. Co. v. Zachary,* 232 U. S. 248, 58 L. Ed. 591, where the deceased, a fireman, having just finished oiling his engine preparatory to go-

ing out on an interstate run, was killed while on his way to his boarding house just outside the yards, for some temporary purpose. The reason for the decision in the *Zachery* case was that there was no cessation of the interstate employment and that the mere temporary interruption of the actual work did not sever the interstate relaionship of the deceased to the defendant company. The present case is much more closely related to the principle that controlled the decision of the court in *Fletcher v. Baltimore & Ohio R. Co.*, 168 U. S. 135, 42 L. Ed. 411. There the plaintiff had finished his day's work in the defendant's shop, and while on his way home from work, while standing in a public street near one of the defendant's tracks, was struck by a missle thrown from one of the defendant's trains by one of its employees. Answering the contention that the plaintiff still occupied the relationship of an employee and could not recover because the injury resulted from an act of a fellow employee, the Court said:

> "The plaintiff at the time of the accident had finished his employment for the day and had left the workshop and grounds of the defendant, and was moving along a public highway in the city with the same rights as any other citizen would have. The liability of defendant to plaintiff for the act in question is not to be gauged by the law applicable to fellow-servants. The facts existing at the time of the accident do not bring it within this rule."

In Volume 1, of Roberts, on Federal Liabilities of Carriers, a leading work on the Federal Employers' Liability Act, it is said in Section 58:

> "A common carrier by railroad is liable only to the servant when the latter is actually

> in the service, and the relationship does not exisit where is appears that the performance of the work has been completed."

The definitions "employee" and "employed" were not intended to be changed in any way by the Federal Act.

> "In the Employers' Liability Act, Congress used the words 'employe' and 'employed' in their natural sense, and intended to describe the conventional relation of employer and employee."
> *Hull v. Phila. & R. R. Co.*, 252 U. S. 475; 64 L. Ed. 670.

So it has been held in the following cases that the injured man was not at the time of the injury employed in interstate commerce:

A conductor leaving his train at a station and having registered, and then boarded another train with the operation of which he had nothing to do, for the purpose of going home—*Dodge v. Chicago Great Western Ry. Co.*, 164 Ia., 627, 146 N. W. 14;

A car record clerk who, having finished the day's work and having turned in his report, was killed while leaving the yards—*Jacoby v. Chicago, etc., R. Co.*, 165 Wis. 610, 161 N. W. 751;

An employee riding home in the employer's train, on a pass, after completing the day's work as fireman on an interstate train—*Knorr v. New Jersey Cent. R. Co.*, 268 Pa. 172, 110 Atl. 797. (Pa.)

In *Gray v. Chicago & N. W. R. Co.*, 153 Wis. 637, 142 N. W. 505 (Wis.), an engine hostler who worked indiscriminately on interstate and intrastate engines, was not while walking back to his shanty to await the com-

ing of another locamotive, an employee during such period of idleness, in interstate commerce.

It is therefore submitted that on no theory can it be held that Mills was employed in interstate commerce at the time of his murder, and that the court erred in allowing the jury to find, not only that the relationship of master and servant existed between the defendant and Mills, but that his interstate employment continued until the shooting.

If the theory of the lower courts is sustained, then obviously the mere fact that the last task that an employee performs before definitely quitting work and terminating his hours of service, imparts to his entire subsequent relationship with the employer, and until the employee at some remote time performs an act connected with intrastate commerce, the status of an interstate employee.

Such a conclusion, we submit, violates the fundamental conception of the Federal Act, and necessarily results in an absorption into the field of interstate commerce of the entire relationship of the employee to the employer, at all times when the employee is not actually engaged in some specific act of *intrastate* commerce. Such a conception is entirely contrary to the test announced by the Supreme Court in numerous decisions in the form of this question:

> "Was the employee at the time of the injury employed in interstate transportation, or in a work so closely related to it as to be practically a part of it?"
> *Shanks v. Delaware L. & W. R. Co.*, 239 U. S. 566; 60 L. Ed. 436.

II

The fact that the defendant furnished armed protection to its employees against strikers did not create a duty on its part to furnish at its peril such protection as would insure the employee against injury.

The reasoning of the Circuit Court of Appeals does not stand analysis. Citing the case of *Erie Railroad Co. v. Winfield, supra*, the opinion says:

> "Though when the employee was shot he had left his employer's premises and was on a vehicle operated by a third party, it fairly may be said that he was still an employee if the trip he was making was in immediate connection with that employment, and during that trip the employer owed him a duty, the performance of which was part of the consideration by which he was induced to enter upon and continue in the employment."

There is not a word of testimony in the record that any promise of protection was made by the railway company to Mills at the time he was employed, or that any such promise entered into the relationship.

Proceeding further the Court of Appeals said:

> "It might be inferred that such protection had to be furnished to obtain labor at the place needed, and that the relation of employer and employee still continued while the employee was on his way from his place of work to his home accompanied by a guard furnished by the employer pursuant to an implied obligation to protect the employee from perils to which he was exposed in consequence of his employment. There was evidence furnishing support for a finding that there was negligence in the matter

of having the employee guarded while he was returning to his home."

The necessary hypothesis for any such conclusion is that the railway company had at its command unlimited forces and complete protection for Mills if it had chosen to furnish it—a praetorian guard for each employee. If such had been the case on this and other railroads, violence on the part of strikers would have been impossible, yet it is a matter of common knowldge that in this particular strike as in many others, the utmost care consistent with any reasonable outlay for protection, failed in numberless instances to avert violence and bloodshed.

In the last analysis the doctrine announced by the Court of Appeals makes the employer virtually an insurer, and in every case where a sudden and unexpected attack is committed, it becomes a question for the jury to determine whether more stringent precautions might have averted a murder—we say "might have" because no one man or twelve could say with any reasonable certainty whether or not the presence of three or four guards would surely have prevented the attack, launched from the rear platform of a street car from which the assailants immediately disappeared into the darkness.

It would seem that the least probable place where the defendant would naturally have anticipated such an occurrence as this was upon a public conveyance, carrying passengers other than Mills, Weathers and Cantrell, whose lives were necessarily endangered by the shooting.

We have been unable to find any decision either from the state or federal courts, in any case based on the Federal Employers' Liability Act, involving the duty of an employer to guard an employee against the acts of

strikers, but the question has arisen in several cases under state compensation acts where the question directly presented was whether an injury to an employee from the acts of strikers was received in the course of his employment.

In *Lampert v. Seimons*, 235 N. Y. 311, 139 N. E. 278, the New York Court of Appeals held that injuries to a department head who continued to work during a strike of the employees, resulting in an assault by a striker while the employee was on his way to work, did not arise during the course of the employment.

The discussion of the applicable principle is so directly in point that we quote in full from the opinion:

> "Had there been no strike, Lampert's employment would have ended when he left the factory at 134 West Thirty-ninth Street. His work was indoor work as foreman of the operating room. There was no work for Lampert to do for his employer after he left the factory at night and before he reached there in the morning. Therefore, all the authorities agree that, while going to and from his work, Lampert, if injured, would not come under the Workmen's Compensation Law (Consol. Laws, c. 76), as such injury would not arise during the course of his employment. *Tallon v. Interborough Rapid Transit Co.*, 232 N. Y. 410, 134 N. E. 327, 21 A. L. R. 1218; *Matter of Schultz v. Champion Welding & Manufacturing Co.*, 230 N. Y. 309, 130 N. E. 304; *Matter of Kowalek v. N. Y. Consol. R. R. Co.*, 229 N. Y. 489, 128 N. E. 888; *Matter of McInery v. Buffalo & S. R. Corp.*, 225 N. Y. 130, 130 N. E. 806; *Walters v. Stavely Coal & Iron Co., Ltd.*, 4 W. C. C. 303, House of Lords, 1911.
>
> "There is a line of cases which holds that

an employee injured while on the streets or in a conveyance may recover compensation. There are cases where the nature of the claimant's work took him to and in the place where he was injured, and where at the time he was actually engaged in doing that for which he was paid (*Matter of Redner v. H. C. Faber & Son*, 223 N. Y. 379, 119 N. E. 842); also compensation has been allowed where the employee was injured while travelling to and from his work in a conveyance furnished by the employer under the contract of employment and the necessities of the situation. (*Matter of Littler v. George A. Fuller Co.*, 223 N. Y. 369, 119 N. E. 554.) In this case, however, Lampert was not doing work for his employer while going to and from his home, neither was he being transported in a conveyance furnished by and under the control of his master.

"The application of the rule which has been made by the court below would carry us very far afield. If, under ordinary circumstances and within the authorities first above cited, Lampert was not carrying on any work for which he was employed while going home or coming to the factory, what was there in the strike which could possibly change this fact? The strike could not extend the field of his employment or the limits of his occupation unless he were employed to do something in connection with the strike, which of course is not this case. That he was in danger on the streets because of the strike is beyond question, but the danger existed at all times, and not necessarily while Lampert was going to and from his work. He could have been assaulted by a striker on the streets while he was going from his home to the theatre or to a dance or other place of amusement. If the limits of his employment

can be extended under such circumstances to cover the distance between his home and the factory, why cannot those limits also be extended to reach any place and any activity in which the workman may be after working beyond hours? The danger may exist in one place as well as another. The fact that the employer may have offered or ordered protection from strikers to the employee while he was upon the street and after the hours of his work would not or could not change the nature of his work or the time of its commencement and completion. The statute says that an employee must be injured while in the course of his employment. In this case Lampert's employment ceased when he left the factory.

"The views which we here express have been the ruling in other jurisdictions where a similar state of facts has presented the same question. *Poulton v. Kelsall*, L. R. 2, K. B. (1912) 131; *Rourke's Case*, 237 Mass. 360, 129 N. E. 603, 13 A. L. R. 564. In both of these cases there was an agreement to protect the employee from violence."

In *Poulton v. Kelsall*, 2 K. B. 131, 81 J. K. B. 774, 106 L. T. 522, it was held that a storekeeper acting as a carter during a carter's strike, on terms that he should be compensated for any injury to him done by strikers, and who was assaulted by strikers in a public street, while on his way home from work, was not injured during the course of his employment so as to be entitled to recover under the English Workmen's Compensation Act.

In *Medlin Milling Co. v. Boutwell*, 104 Tex. 87, 133 S. W. 1042, the court observed that—

"It is not the legal duty of a master to protect the servant from unlawful assaults by strangers."

In *Rourke's Case*, 237 Mass. 360, 129 N. E. 603, it was held that an injury caused by assault of a striker upon the claimant on a public street was not received within the course of the employment of the assaulted person within the meaning of the Workmen's Compensation Act, where he had left his place of employment for the day and was proceeding toward his boarding house, although because of a strike at the plant he was provided by the employer with a place to board and lodge, toward which he was proceeding accompanied by the master's superintendent, who had promised him protection. The court said:

"Unless the incidents of employment be exceptional the relation between a master and his servant is suspended when the servant leaves the place of his actual employment at the close of his day's work to go to his home, and again becomes active when, after the interval of rest, the laborer puts himself in a position where he can do the work of his employment at the place where it is to be performed. *Langley v. Boston Elev. R. Co.*, 223 Mass. 492, 496, 112 N. E. 79

"In the case at bar the day's work of the claimant came to an end when he dropped his tools, rang in his time, left the place of his employment, and entered upon the public highway. While not conclusive in the determination of the incidents of the employment, it is worthy of consideration that thereafter the employer under the contract of employment had no legal right to command the services of the

claimant and he was under no duty of obedience thereto.

"As bearing upon the question of the incidents of the employment, we can perceive no resemblance between a contract of protection against criminal acts of third persons who may seek to coerce a hostile employer to grant their demands through the intimidation of and assaults upon his servants and a contract of employment which has regard to conditions and circumstances which are the natural, and not abnormal, concomitants of the work to be performed under the contract, for example, agreements for transportation, when the place of work is at a distance. *McGuirk v. Shattuck*, 160 Mass. 45, 39 Am. St. Rep. 454, 35 N. E. 110; *Kilduff v. Boston Elev. Co.*, 195 Mass. 307, 9 L. R. A. (NS) 873, 81 N. E. 191; *Donovan's Case*, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778, 4 N. C. C. A. 549. See *Harbroe's Case*, 223 Mass. 139, 142, L. R. A. 1916D, 933, 111 N. E. 709."

In *Roebuck v. A. T. & S. F. R. Co.*, 99 Kan. 544, 162 Pac. 1153, L. R. A. 1917E, 741, the action, brought under the Federal Act, was based upon the alleged negligent retention by the employer, of Megreta, a vicious employee, after warning to the employer of his propensities and the promise of protection to the deceased, who was thereafter shot and killed by Megreta. In holding that there was no liability, the court said:

"It is plain that it could not have been the intention of Congress to make the carrier liable for the injury or death of an employee occasioned by the act of a stranger. We are fully in harmony with the liberal interpretation of the Federal Employers' Liability Act by the Fed-

> eral courts generally; but we cannot conceive it to have been the intention of Congress to impose upon the carrier duties and obligations save those of an employer; nor that it was the purpose to impose new obligations not usually imposed upon employers except as the law of master and servant is by the express terms of the act itself limited or restricted."

And in *Davis, Director General v. Green*, 260 U. S. 349, 67 L. Ed. 249, it was held that no recovery could be had under the Federal Act for the intentional killing of plaintiff's intestate by a fellow employee, on the theory that the railroad negligently and knowingly employed a dangerous man.

III.

The death of Mills resulted from an independent intervening cause not proximately related to any negligence of the defendant.

It is submitted that in the first place, and regardless of other controlling considerations, that it could not conceivably have been the duty of the defendant to assume that murder would be committed by strikers on a public conveyance. The opinion of the Circuit Court of Appeals, on the other hand, proceeds on the contrary hypothesis: that the jury could say that "the injury was the *natural* and *probable* consequence of the negligence, and in the light of attending circumstances ought to have been foreseen" by the defendant. And again, proceeding upon the same erroneous theory, it is said:

> "If the misconduct is of a character which according to the usual experience of mankind, is calculated to invite or induce the interven-

> tion of some subsequent cause, the intervening cause will not excuse him and the subsequent misconduct will be held to be the result of the original misconduct. *Milwaukee, etc., Railway Co. v. Kellogg*, 94 U. S. 469; *Atchison, etc., Ry. Co. v. Stone*, 213 U. S. 1, 9; *Delaware & Hudson Co. v. Ketz*, 233 Fed. 31."

This language illustrates the misconception of the law of proximate cause that led to the judgment and its affirmance. For to say that the murder was the *result*, the *natural and probable consequence*, reasonably to be expected by the defendant from its failure to furnish a stronger guard is to transmute a mere inactive condition into an active causative force, responsible for the killing.

Such an idea violates the principle announced in the *Kellogg* case, cited by the Court of Appeals. There it was said:

> "The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a succession of events so linked together as to make a natural whole; *or was there some new and independent cause intervening* between the wrong and the injury?" (Our italics.)

And this language, even stronger, from the opinion in the *Kellogg* case:

> "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. *They are not* when there is a sufficient and independent cause operating between the wrong and the in-

> jury. In such a case the resort of the sufferer must be to the originator of the intermediate cause."

Thus it appears that the Court of Appeals has misapplied the *Kellog* case in a manner directly affecting a controlling question here.

Again, as the court said in *A. T. & S. F. Ry. Co. v. Calhoun*, 213 U. S. 1, 53 L. Ed. 671:

> "Where in the sequence of events between the original default and the final mischief, an entirely independent and unrelated cause intervenes and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause, and the other the remote cause."

The following language from Cooley on Torts, 2nd Ed., p. 23, appears in the opinion in the *Calhoun case*:

> "It is not only requisite that damage should be suffered, but that this damage should be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded, and in the application of it the law rejects as not constituting the foundation for the action that damage if it does not flow proximately from the act complained of. The explanation of this maxim may be given thus. If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause and refuse to trace it to that which was remote."

A careful analysis of the authorities discloses that the error of the Court of Appeals lies in the failure to distinguish between those cases in which the so-called intervening cause was one directly and obviously induced or put in operation as a result of the original negligence, and those cases where, as here, the intervening cause bore no relation whatever to the original negligence.

As in the *Kellogg* case, where the fire, negligently allowed to escape and set fire to a grain elevator was thence borne by the wind to the plaintiff's lumber and destroyed it.

For example, if one negligently leaves a dangerous explosive, attractive to children, in an unguarded place, and a child finding it, causes it to explode to the injury of a third person, the original negligence in leaving the explosive unguarded is obviously not insulated or turned aside by the act of the child. For there the negligence was such as to "invite or induce," to use the language of the Court of Appeals, an act by an irresponsible agent that directly put into destructive operation, the original negligence. See the typical case of *Shroka v. Halliday*, 41 R. I. 322, 103 At. 799, L. R. A. 1918E, 688.

But the defendant in the case at bar did nothing. It was guilty, at worst, of allowing a condition to exist which may have rendered easier the commission of the murder—the operation of the independent, intervening cause.

This distinction is clearly recognized and applied in the decision in *Jarnagin v. Travellers Protective Assn.*, 133 Fed. 892, 68 L. R. A. 499. There the contention was made that the negligence of police officers in failing while they held the deceased under arrest, to prevent his

murder by other persons, was the proximate cause of his death. But the Circuit Court of Appeals for the Sixth Circuit in an opinion concurred in by Judge Lurton, said:

> "The shots of his assailants were the direct and proximate cause and the failure of the officers to protect him was only a condition which may or may not have contributed to the result. It may have been easier to kill him because of the condition, but it was not the condition which killed him."

In the careful discussion of this question in the note to *Gilson v. Delaware, etc., Canal Co.*, 36 A. S. R. at p. 842, this rule is deduced:

> "As will be seen from the cases cited in the following paragraph, the courts, at least in this country, refuse to hold a tort feasor liable for the results of a subsequent act which is willfully wrong, unless that act was actually intended by him."

Following this the annotator citing the opinion of Justice Holmes says:

> "A very eminent judge thus states the principle governing these cases: 'Wrongful acts of independent third persons (not actually intended by the defendant), are not regarded in law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual.' *Burt v. Advertiser, etc., Co.*, 154 Mass. 238 (per Holmes, J.)"

This merely concurs in the familiar rule laid down in Wharton on Negligence, Sec. 134:

> "Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? The question must be answered in the negative, for the general reason that causal connection between negligence and damages is broken by the interposition of independent responsible human action. I am negligent on a particular subject matter (as to which I am not contractually bound). Another person, moving inadequately, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured."

No language could be more appropriate to the case at bar than the following excerpt from the opinion in *Laidlaw v. Sage*, 158 N. Y. 73, 44 L. R. A. 216, 226:

> "As has been said in an anonymous article in the American Law Review: 'A proximate cause is one in which is involved the idea of necessity. It is one the connection between which and the effect is plain and intelligible: it is one which can be used as a term by which a proposition can be demonstrated, that is, one which can be reasoned from conclusively. A remote cause is one which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn. In other words,

a remote cause is a cause the connection between which and the effect is uncertain, vague, or indeterminate. It does not contain in itself the element of necessity between it and its effect. Marcilius Ficinus says: 'From the remote cause the effect does not necessarily follow. This idea of necessity—the necessity connection between the cause and the effect—is the prime distinction between a proximate and a remote cause. The proximate cause being given, the effect must follow. But, although the existence of the cause is necessary for the existence of the effect (for, unless there has been a remote cause, there can be no effect), still the existence of the remote cause does not necessarily imply the existence of the effect. The remote cause being given, the effect may or may not follow.' 4 Am. L. Rev., pp. 201, 205. In *Marble v. Worcester*, 4 Gray 396, Chief Justice Shaw said: 'On account of the difficulty in unraveling a combination of causes, and tracing each result, as a matter of fact, to its true, real and efficient cause, the law has adopted the rule before stated, of regarding the proximate, and not the remote, cause of the occurrence, which is the subject of inquiry.' In *Crain v. Petrie*, 6 Hill 522, 524, 41 Am. Dec. 765, the question of special damages was involved, and, consequently, the question of proximate cause; that is, whether the special damages were the legal and natural consequences of the wrong complained of. Nelson, Ch. J., 44 L. R. A., in that case said: 'To maintain a claim for special damages, they must appear to be the legal and natural consequences arising from the tort, and not from the wrongful act of a third party remotely induced thereby. In other words, the damages must proceed wholly and exclusively from the injury complained

of.' In *Milwaukee and St. P. R. Co. v. Kellogg*, 94 U. S. 475, 24 L. Ed. 259, it was said: 'The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. In *Hofngale v. New York C. & H. R. R. Co.*, 55 N. Y. 612, it was held that the act of one person cannot be said to be the proximate cause of an injury when the act of another person has intervened and directly inflicted it.

"Another principle of proximate cause which seems to be well established is that an accident or injury cannot be attributed to a cause unless, without its operation, it would not have happened. *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. St. Rep. 574; *Taylor v. Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492; *Ayers v. Hammondsport*,, 130 N. Y. 665; *Grant v. Pennsylvania & N. Y. Canal & R. Co.*, 133 N. Y. 657. When damages claimed in an action are occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which he is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause, and the jury must not be left to mere conjecture, and a bare possibility that the damage was caused in consequence of the act of the defendant is not sufficient. *Searles v. Manhattan R. Co.*, 101 N. Y. 662. The plaintiff must fail if the evidence does not show that the injury was the result of some cause for which the defendant is responsible; and, where the proof is by circumstances themselves must be shown, and not left to rest in conjecture; and, when shown, it must appear that the inference sought is the only one which can fairly and reasonably be

drawn from the facts. *Ruppert v. Brooklyn Heights R. Co.*, 154 N. Y. 94."

In 22 R. C. L., p. 124, 137, it is said that wrongful acts of independent third persons not actually intended by the defendant, are not regarded by the law as the natural consequence of his wrong and he is not bound to accept the general probability of such acts any more than a particular act by this or that individual. The rule applies *a fortiori* to criminal acts.

Again, it is said at page 122 of 22 R. C. L.:

> "It is not enough to prove that the act is the natural consequence of the negligence. It must also have been the *probable* consequence. A probable consequence is one that is more likely to follow the supposed cause than it is to fail to follow it."

In *Carter v. Atl. Coast Line R. Co.*, 109 S. C. 119, 95 S. E. 357, 11 A. L. R. 1411, a station agent suing under the Federal Act sought to recover from the railroad for injuries resulting from an assault committed upon him by a robber, on the theory that the negligent and insufficient lighting of the station made the assault possible. It was held, however, that the negligence, if any, in not sufficiently lighting the station, was not the proximate cause of the injury. The court said:

> "Certainly, the want of light did not directly cause or contribute to the injury. There was no causal connection whatever between the two events. That kind of an injury was neither a natural nor a probable consequence which might have reasonably have been expected to result from the failure to keep all the lights

burning. The want of light was merely a condition which might or might not have influenced the intervening independent act of the robber, over whom defendant had no control.

"The authorities are practically unanimous in holding that, when the negligence alleged appears merely to have brought about a condition of affairs, or situation under which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause. The doctrine is discussed and illustrated by numerous cases in Thomp. Neg. Sec. 43,*et seq.* A late case in point is *Chancey v. Norfolk & W. R. Co.*, 174 N. C. 351; L. R. A. 1918A, 1070; 93 S. E. 834; Ann. Cas. 1918E, 580, in which the court held that a carrier was not liable for the robbery of a passenger, alleged to have been caused by the insufficient lighting and overcrowding of its cars.

"As the facts, viewed in the most favorable light for plaintiff, were undisputed and susceptible of but one reasonable inference, the decision of question was one of law for the court."

In *Frazer v. Chicago, R. I. & Pac. R. Co.*, 101 Kan. 122, 165 Pac. 831, L. R. A. 1917E, 749, the suit was brought under the Federal Employers' Liability Act for injuries received by the plaintiff employee from the assault of an intruder. The negligence relied upon was the failure on the part of the defendant to close and bolt the doors of the freight house where the plaintiff performed duties at night, which gave access to the intruder, who shot the plaintiff. Holding that the negligence, if any,

was not the proximate cause of the injury, the Supreme Court of Kansas said:

> "The omission of the door man to bolt the closed door, and the shooting of the plaintiff, do not bear to each other the relation of cause and effect. Omission to bolt the door was fraught with no peril to the plaintiff, active or patent. Bolted or unbolted, the door was not a hazard which plaintiff encountered in his rounds, and omission to bolt it neither supplied nor set in action any dangerous instrumentality or agency. It merely created a condition which made entrance to the building less difficult than it otherwise would have been, should any one desire to enter.
>
> "The injury resulted from the violent and malicious act of a desperate person who took advantage of the condition to enter the building for some purpose not disclosed. He may have gone there to steal. When surprised, he exhibited such conduct as he willed, shot the plaintiff, and fled, but conduct which originated with him, and which did not originate with the door man or the door the evening before.
>
> "The plaintiff cites the well-known authorities to the effect that, if the action of an intervening cause might have been anticipated, the intervening cause will not interrupt the connection between the original cause and the injury. The rule is sound, but it presupposes an original cause of injury which manifests consequences in an injurious result. We all anticipate pocket picking when the circus comes, and housebreaking during fair week; but the circus and the fair are not the causes of such crimes. We know, too, that should a housebreaker be discovered in the act of committing burglary,

> he might do violence to a person interrupting his depredation. But if, knowing the city to be infested with such characters, we go out for the evening leaving the back door unlocked and leaving a servant in the house, omission to lock the door is not the cause of the burglary, should one occur, or the cause of the injury to the servant who tries to intercept commission of the crime. The cause of injury originates with the burgler, whose entrance into the house was not obstructed by a locked door."

IV.

The evidence leaves it wholly uncertain whether, if more guards had been provided on the car, the shooting would not have occurred.

It is submitted that it is wholly a matter of speculation whether the presence of any more guards on the car would have prevented the shooting. To assume that they would, or that it was for the jury to find that in such a way the shooting would have been prevented, was to allow the jury to speculate upon possibilities or probabilities wholly outside the limits of the record. It is perfectly evident from the testimony that the murderers got on the car with the definite purpose of killing Weathers, and possibly Mills, either on the car or of removing him from the car and then doing so. When Weathers was seized by one of the men who came into the car from the rear platform and Weathers resisted, the shooting commenced—a circumstance indicating definitely that the purpose of the strikers was to get Weathers, dead or alive. It is equally probable, if there had been two, or three, or four guards on the car instead of the one man, Cantrell, when the street car stopped at

Thrash Station where the shooting took place, that the strikers would have singled out Weathers and Mills, shot them, and leaped from the street car into the darkness, regardless of the presence of other guards who were the objects of their hostility equally with Weathers and Mills, as to assume or speculate that they would have desisted from their purposes. The presence of more guards could not have prevented the sudden volley that actually came from the back of the car.

The jury were allowed to speculate upon possibilities and probabilities having no basis in the evidence.

> "A servant cannot recover where it is merely a matter of conjecture, surmise, speculation, or supposition, whether the injury was or was not due to the negligence of the master."
> Vol. 4, Labatt, Sec. 1604..

It has been the rule announced for years by all the authorities, that where the testimony leaves the matter uncertain and shows that the injury may have been brought about as a result of some act of negligence, or as a result of some independent cause, and the evidence leaves it uncertain as to what is the proximate cause, then there can be no recovery.

As said by Judge Sanborn in *Midland Valley R. Co. v. Fulghum*, 181 Fed. 91:

> "Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the property or money of one litigant to another. Substantial evidence of the facts which constitute the cause of action is indispensable to the maintenance of the verdict sustaining it."

As the court said in *Patton v. Texas & Pac. R. Co.* 179 U. S. 658, 45 L. Ed. 361:

> "It is not sufficient for an employee to show that an employer could have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of a half dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half dozen causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion."

Respectfully submitted,

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